BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY BENNETT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,051,400
VANGENT, INC.	)	
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the September 5, 2012, Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on February 6, 2013.

APPEARANCES

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. John R. Emerson, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant to be realistically unemployable due to her pain level, age, lack of mobility, and forced use of strong pain medications, which resulted in loss of concentration and memory function, leaving claimant permanently and totally disabled. The ALJ denied respondent's request for a 6 percent offset for retirement benefits respondent is paying to claimant, due to a lack of reliable wage and contribution information. The ALJ also denied respondent's request for an offset for the social security retirement benefits claimant is receiving.

Respondent appeals arguing that claimant is not permanently and totally disabled. Respondent contends claimant is entitled to no more than a 59 percent permanent partial general (work) disability (100% wage loss and 18.75% task loss) based on the opinion of the court ordered neutral physician, beginning July 27, 2011. Additionally, claimant should be subject to an offset for the social security retirement benefits she is receiving, and the 401(k) retirement benefits claimant receives as the result of contributions made by respondent.

Claimant argues the Award should be affirmed. In the alternative, claimant argues she has proven her entitlement to a permanent partial disability general disability award.

The issues for this appeal are as follows:

1. Nature and extent of claimant's disability;

2. Is respondent entitled to an offset for social security and 401(k) retirement benefits.

FINDINGS OF FACT

Claimant began working for respondent on April 9, 2007, as a customer service representative for 1-800-medicare. Claimant worked for respondent for 4 years, last working on July 27, 2010.[1] Claimant sat at a desk for 8 hours a day, answering inbound calls and accessing scripts on the computer while resolving questions concerning Medicare. Claimant was allowed to stand if needed when talking on the phone, but the computer work made standing difficult.

Claimant suffered an injury on Sunday, December 27, 2009, when she slipped on the ice in respondent's parking lot, while on her way into work. She testified that the snow had been cleared from the sidewalk and leveled out on the curb where she parked. However, as she walked alongside her car, she stepped onto the sidewalk, slid and lost her balance, hitting her back against her car and landing on the ground on her left side. Claimant was being extra careful because four months prior she had undergone left hip replacement surgery. Claimant denies any problems with her back before this incident. Claimant worked her entire shift that day, reporting her accident the next day, December 28, 2009, to her supervisor Fred Jehle. She told Mr. Jehle that she had slipped and fallen and thought she had pulled a muscle in her back.

[1] Claimant testified during her May 21, 2012, deposition that her last day was July 27, 2011, but vocational expert Robert W. Barnett, Ph.D., found claimant earned no wages in the year 2011. Barnett Depo. at 12-13. At the regular hearing claimant clarified her last day with respondent was July 27, 2010.

Although claimant worked her entire shift after the accident, she had trouble sitting and her left leg would go to sleep. Despite these symptoms, claimant did not ask for medical attention when she first reported her injury.

Four days after the accident, claimant sought medical attention with Dr. Dunlap, her family physician, at FirstMed. Claimant was experiencing severe pain in her low back. X-rays indicated an endplate compression fracture at L1.

Claimant also met with Dr. Chris Fevurly, the respondent's workers compensation physician, at the Lawrence Memorial Hospital. Dr. Fevurly ordered an MRI which was completed on January 21, 2010, and verified a compression fracture at L1 and also at L2, with mild canal stenosis.

Dr. Fevurly referred claimant to Dr. John Ciccarelli, who verified she had a broken vertebrae and an extruded disc fragment at L1-2. Claimant was sent for nine physical therapy visits. She was told after therapy that she was healed, but she continued to have problems with her left leg going to sleep and she had a lot of pain when she walked. Claimant reported this pain to Dr. Ciccarelli, but nothing was done and she was released to return to work. Claimant continued to followup with Dr. Dunlap for continued treatment with pain medication.

Two weeks after the fall claimant purchased a cane to help her get around. She used the cane for two weeks. Claimant eventually met with Dr. Bernhardt and Dr. Amundson for evaluations. Claimant testified that she sometimes still uses the cane for support in order not to wobble because when she wobbles her back and leg hurt. She stated that with the cane she can comfortably walk 50 feet.

Claimant denied having any problems with her left leg before December 2009. She testified to no longer being able to stand in the kitchen to make a sandwich or pick up a laundry basket. Claimant takes Oxycodone every 6 hours for pain. This medication is being prescribed by her family doctor. Claimant can drive for 30 minutes before she has pain and after 45 minutes to an hour she has to stop and get out of the vehicle. Additionally, the Oxycodone has caused claimant to develop memory problems which did not exist before she began taking the medication.

Claimant last worked for respondent on July 27, 2010. Claimant testified that she quit her job because she had to walk more when the company reorganized its operations. This caused her more pain and resulted in her having to take more pain medication, which affected her memory. Those memory issues also affected claimant's ability to perform her work. Claimant testified this memory loss began five or six months after the injury.

Claimant was born on July 29, 1942, and was 69 years old at the time of the regular hearing. Claimant is currently being paid $1,502 per month in social security retirement

benefits, with the payments beginning in 2006,[2] before she began her employment with respondent, or 2008.[3] Before receiving her own social security retirement benefits, claimant was receiving widow's benefits through Social Security, beginning in either 2004 or 2005.

While claimant worked for respondent, she participated in a 401(k) retirement plan. Respondent contributed 6 percent of claimant's gross income to her account. Claimant testified that her final rate of pay was $14.88 an hour. Claimant also contributed to the retirement account but was unsure how much she actually paid. Respondent provided a "contractor's plan" based upon claimant's wages and to which claimant also contributed. Claimant was unaware of the amounts of money involved in this plan. Sometime after her last day with respondent, claimant cashed in the 401(k) fund, but did not testify as to when this occurred or how much money she actually received.

Before going to work for respondent, claimant worked for a convalescent retirement center in Baldwin, Kansas as a cook. As part of this job, claimant had to stock shelves and clean pans. Before that, claimant worked for MV Transportation receiving calls, scheduling rides and preparing statistical reports. Claimant developed carpal tunnel syndrome while working at MV Transportation. Claimant filed a workers compensation claim; had carpal tunnel syndrome surgery on both hands with Dr. Ketchum, and ultimately settled that claim.

Claimant also worked for Health Care Access for less than a year, scheduling appointments and working the reception desk. She suffered a slip and fall accident with Health Care Access. An accident report was filled out, but claimant did not pursue the claim. The area of alleged injury was between claimant's shoulders close to her neck.

Claimant also owned her own airport shuttle business for a time and was responsible for hiring; firing; payroll; taxes; reports; safety meetings; cleaning, etc. Claimant's business was in transportation so she also had to do some driving.

Claimant met with board certified orthopedic surgeon Mark Bernhardt, M.D., for a court ordered IME on April 5, 2011. At this evaluation, claimant had complaints of low back pain, bilateral hip pain and left leg pain. Claimant expressed concern that she might have injured her hip and she was only four months out from hip replacement surgery.

When Dr. Bernhardt examined claimant he found chronic thoracolumbar junction back pain; lumbar radiculitis; left leg; L1 and L2 compression fractures, healed; and degenerative lumbar disc disease. He assessed claimant a 15 percent whole person functional impairment under DRE Thoracolumbar Category III, of the 4th edition of the

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[2] R.H. Trans. at 14.

[3] R. H. Trans. at 22.

AMA *Guides*.[4] Initially, Dr. Bernhardt opined that claimant was capable of performing the duties of her regular job without restrictions. At his deposition however, he testified that claimant needed restrictions for the compression fractures, stating she should lift no more than 30 pounds on an occasional basis. Of the 16 tasks on the list prepared by vocational expert Robert Barnett, Dr. Bernhardt determined claimant was not able to perform 3 with his new lifting restriction. This calculates to a task loss of 18.75 percent. Dr. Bernhardt acknowledged that claimant was on significant pain medication, taking Oxycodone and occasional Tylenol or Ibuprofen. He also agreed it would be an individual decision as to whether to quit work due to pain.

At the request of her attorney, claimant met with board certified physical medicine and rehabilitation specialist, Pedro A. Murati, M.D., for an examination on May 8, 2012. Claimant displayed complaints of low back pain, the inability to lift more than a gallon of milk, and increased low back pain when standing and walking.

Dr. Murati diagnosed claimant with low back pain with signs and symptoms of radiculopathy; left SI joint dysfunction, and L1 and L2 compression fractures. He went on to opine that the diagnoses were, within reasonable medical probability, a direct result of the work-related injury that occurred on December 27, 2009.[5] Dr. Murati went on to find claimant essentially and realistically unemployable and recommended she apply for social security disability benefits. Dr. Murati also assigned a 23 percent whole person impairment (10 percent whole person for the low back pain with signs and symptoms of radiculopathy; 10 percent whole person impairment for the L1 fracture and 5 percent whole person impairment for the L2 fracture).[6]

Dr. Murati assigned claimant work restrictions of, limiting claimant to a four-hour work day, with occasional sitting, standing and walking, no bending; crouching or stooping; no crawling; no lifting; carrying; pushing or pulling over 10 pounds, occasionally, 10 pounds, frequently 5 pounds; occasionally driving; rarely to climb stairs, ladders or squat; alternate sitting, standing and walking as needed, and to be allowed 10 minutes of rest every 30 minutes.[7] Dr. Murati reviewed the task list of Robert Barnett and opined that claimant had an 88 percent task loss.

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[4] American Medical Ass'n, Guides to the Evaluation of Permanent Impairment (4th ed.).

[5] Murati Depo., Ex., 2 at 5 (Murati's May 8, 2012 IME report).

[6] Murati Depo., Ex., 2 at 5 (Murati's May 8, 2012 IME report).

[7] Murati Depo., Ex., 2 at 6 (Release to Return to work dated May 8, 2012).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

K.S.A. 2000 Furse 44-510e defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The Board will first determine what, if any, functional impairment claimant suffered as the result of the injuries suffered on December 27, 2009. Dr Bernhardt assessed claimant a 15 percent whole body functional impairment as the result of her injuries. Dr. Murati found claimant to suffer a 23 percent whole person functional impairment, with both opinions being provided pursuant to the AMA Guides, 4th ed. The Board finds the opinion of Dr. Bernhardt to be the most persuasive, and assesses claimant a 15 percent whole person functional impairment as the result of her injuries on December 27, 2009.

K.S.A. 2000 Furse 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 2000 Furse 44-510e, in defining permanent partial general disability, states that it shall be:

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[8] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

The Board must next determine whether claimant is entitled to a permanent partial general (work) disability or is permanently and totally disabled. Dr. Murati, claimant's hired expert, found her to be realistically unemployable because of her injuries and the significant medication her injuries require she use. Dr. Bernhardt, on the other hand, found claimant capable of returning to work with restrictions and a task loss. He did note claimants required use of strong pain medication which would alter her ability to function at a job and which effected her memory. He cautioned that patients should not take "mind-altering drugs, habit-forming drugs for chronic conditions if at all possible but some patients require them and that was – – appeared to be her case."[10] From a purely physical standpoint, claimant would appear capable of remaining in the open labor market, performing substantial work. However, when the aspect of her required pain medication is added to the equation, her employability becomes more questionable. The ALJ found, and the Board agrees, claimant is not realistically employable when considering her pain level, age, lack of mobility and forced use of strong pain medications with the resulting loss of concentration and memory functions.

K.S.A. 2009 Supp. 44-501(h) states:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided b the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefits, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

Claimant testified that she was receiving social security benefits in the amount of $1,502 per month in 2006.[11] This was before she began working for respondent on April 9,

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[10] Bernhardt Depo. at 20-21.

[11] R.H. Trans. at 13-14.

2007. Claimant testified that she returned to work in 2007 because the social security benefits she was receiving were not adequate.[12] An employer's entitlement to an offset under K.S.A. 44-501(h) has been addressed by the appellate courts on several occasions.

The purpose of this statutory offset, or reduction, is to prevent wage-loss duplication.[13] However, the Kansas Supreme Court has created an exception to the statute that applies to retired workers who are already receiving social security retirement benefits and then reenter the workforce to supplement that social security income.[14]

In *Dickens* the claimant retired at age 64 and then returned to work for Pizza Hut to supplement his social security retirement benefits. Some time later he suffered a work-related accident and resulting injuries. Pursuant to K.S.A. 1998 Supp. 44-501(h), the Board reduced the amount of his workers compensation benefits by the amount of his social security retirement benefits. The *Dickens* court reversed, finding that the duplication of wage-loss replacement is not a concern when the worker becomes employed to supplement the social security retirement benefits he or she is already receiving. Rather, the concern is ensuring that the statute allows the worker to recover the benefits he or she was entitled to as a result of the wage loss caused by the injury. The *Dickens* court held that a workers compensation award should not be offset because of social security retirement benefits if the injured worker was receiving the benefits before reentering the workforce.[15] In a more recent decision, the Supreme Court held that "if an employee retires and then returns to work to supplement his or her income, the reduction does not apply, as the employee's receipt of both workers compensation benefits and social security retirement benefits are not duplicative."[16]

Here, claimant was unemployed and on social security for two years and then returned to work for respondent to supplement her social security income, which she described as inadequate, before she suffered the work-related accident. Pursuant to *Dickens* and *Robinson*, this respondent is not entitled to the offset for claimant's social security retirement income.

After claimant left her employment with respondent, she cashed in a lump sum 401(k) retirement plan. While claimant testified that respondent contributed 6 percent of her gross income to the plan, she also stated that she contributed to the account as well.

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[12] R.H. Trans. at 15.

[13] *McIntosh v Sedgwick County*, 32 Kan. App. 2d 889, 91 P3d, *rev. denied* 278 Kan 846 (2004).

[14] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

[15] *Dickens* at 1071.

[16] *Robinson v. City of Wichita Retirement Bd. of Trustees*, 291 Kan. 266, 286, 241 P.3d 15 (2010).

No information was provided to accurately identify the amount of the lump-sum payment claimant received when the account was cashed in, how much of that amount represented respondent's contributions, how much stemmed from claimant's contributions and over what period the payment applied. In a workers compensation case, the burden of proof is on the claimant to establish his or her right to an award.[17] However, once the claimant has met this burden, the respondent employer has the burden to demonstrate any exception.[18]

Here, respondent has failed to identify the amount of claimant's 401(k) lump-sum payment or how much of that payment would apply to respondent's contributions to the plan. This financial information, which should have been readily available to respondent, simply was not placed into this record. Respondent has failed to identify what, if any, offset it would be entitled to as the result of claimant's receipt of the 401(k) plan payment. Respondent's request for an offset of claimant's receipts from the 401(k) plan is denied.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find claimant suffered a 15 percent permanent partial functional whole body impairment, but affirmed in all other respects. Claimant has satisfied her burden of proving that she is permanently and totally disabled as the result of the accident and resulting injuries suffered on December 27, 2009. Respondent has failed to prove entitlement to any offset under K.S.A. 44-501(h) for either claimant's social security retirement income or the payment received from claimants 401(k) plan.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 5, 2012, is modified to find claimant suffered a 15 percent permanent partial whole body functional impairment, but affirmed in all other regards.

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[17] *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[18] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member respectfully dissents from the majority ruling.

The majority of the Board concludes that the social security offset does not apply because claimant had previously retired and returned to work to supplement her social security earnings, as in *Dickens.*[19] This Board Member does not view the facts in this case as fitting nicely with the facts of *Dickens* and other cases where a worker retired, obtained social security retirement earnings and then was injured after returning to limited or part-time work to supplement his or her social security retirement income.[20]

As an initial matter, receipt of social security retirement benefits is not the equivalent of being retired, as pointed out in *McIntosh*.[21] Moreover, claimant's full-time employment with respondent showed that she was not retired. If anything, she was "un–retired."

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[19] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

[20] See *Boyd v. Barton Transfer & Storage*, 2 Kan. App. 2d 425, 580 P.2d 1366, *rev. denied* 225 Kan. 843 (1978).

[21] *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 897, 91 P.3d 545, *rev. denied* 278 Kan. 846 (2004).

This Board Member cannot tell whether claimant met her burden of establishing, more probably than not, that she had retired before her injury. Claimant was self-employed in ground transportation for 10 years. She attended Lawrence Career College for one year. She was employed by Health Care Access for less than a year. She was employed by MV Transportation for four years, but had a workers compensation claim necessitating bilateral carpal tunnel surgeries that resulted in a settlement. Claimant was off work for about one year, but receiving social security widow's benefits, perhaps around 2004 or 2005. Claimant also testified that there was a period of time in 2005 and 2006 that she was retired and not working anywhere. This Board Member cannot tell from the record whether this time away from work was due to the bilateral carpal tunnel injuries or due to a true retirement. In any event, claimant testified her widow's benefits were not enough to live on, so she started working part-time as a cook at a convalescent retirement center in Baldwin in 2007 for a little more than one year. Claimant was employed by Vangent starting April 9, 2007.[22]

Claimant testified there was no gap between her employment for the convalescent retirement center and her employment with Vangent.[23] For a time, she worked both jobs during the same time frame.[24] Claimant's working two jobs would tend to show she was not retired and merely supplementing social security earnings, as in *Dickens* and *Boyd*.

Claimant testified she was on her own social security (not widow's benefits) before her injury at Vangent.[25] Claimant testified that she started getting her own social security benefits in 2006, but also that such benefits could have started when she turned 65 years and 10 months in 2008.[26] The record is unclear as to when such benefits actually began. If claimant's social security retirement benefits commenced after she started working for respondent, the majority's argument - that claimant had retired, started receiving social security, and then returned to work to supplement social security income - rests on incorrect information. This Board Member does not think claimant proved by a preponderance of the credible evidence when her social security retirement benefits began, at least when the record is muddied and conflicting.

This Board Member also questions how the appellate courts would address the social security offset based on strict construction of K.S.A 44-501(h). When *Dickens* was presented to the Board for decision, the Board noted:

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[22] Claimant's Depo. Trans. at 29-33, 43-44; R.H. Trans., at 6-7, 12, 13-15.

[23] Claimant's Depo. at 30.

[24] *Id.* at 44.

[25] *Id.* at 13.

[26] R.H. Trans. at 13-15, 21-22.

> [T]he initial language of K.S.A. 44-501(h) "if the employee is receiving retirement benefits" does not appear to contemplate a rejection of the application of this statute merely because a claimant was receiving benefits prior to an accident. The language "is receiving" indicates the legislature did not make a distinction between benefits received prior to an accident and those begun after an accident occurred. Therefore, the Appeals Board finds the social security benefit offset would apply regardless of whether the social security benefits were being paid prior to an accident or were started after an accident occurred.[27]

Of course, the Board is duty bound to follow binding precedent,[28] such as *Dickens*, where the Kansas Supreme Court ruled that the social security offset did not apply to a worker who retired and then returned to part-time employment to supplement his retirement income. The Kansas Supreme Court in *Dickens* observed:

> The fundamental rule of statutory construction is to determine legislative intent whenever possible. *Boyd*, 2 Kan. App. 2d at 428, (citing *State, ex rel., v. City of Overland Park*, 215 Kan. 700, 527 P.2d 1340 [1974]). In determining legislative intent, we are not limited to a mere consideration of the language used in the statute. *Brown v. Keill*, 224 Kan. 195, Syl. ¶ 3, 580 P.2d 867 (1978).
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> The 1993 amendments were enacted generally to reduce the cost of workers compensation insurance premiums. See Rebein, 62 J.K.B.A. at 30-31. K.S.A.1998 Supp. 44-501(h) in particular was added to prevent duplication of wage-loss benefits. *Franklin*, 262 Kan. at 870. Legislative intent governs construction of a statute *even though the literal meaning of the words used in the statute is not followed*. We hold the Board's interpretation is contrary to the intent of K.S.A.1998 Supp. 44-501(h) [emphasis added].[29]

The Board is duty bound to follow the mandate of *Bergstrom*[30] that plainly-worded workers compensation statutes must be interpreted literally.[31] *Bergstrom* states:

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007). The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a

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[27] *Dickens v. Pizza Co.*, No. 216,769, 1998 WL 100141 (Kan. WCAB Feb. 25, 1998).

[28] See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P. 2d 807 (1998).

[29] *Dickens v. Pizza Co., Inc.*, 266 Kan. 1066, 1071, 974 P.2d 601, 604 (1999).

[30] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[31] *Tyler v. Goodyear Tire and Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

> statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language. *Hall*, 286 Kan. at 785.
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> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).[32]

The decision in *Dickens* was not based on literal interpretation of K.S.A. 44-501(h), at least based on the Court's acknowledgment in the decision itself. For that matter, *McIntosh* was not decided based on literal interpretation of the statute. Both cases focus on factors *not* contained within the plain language of K.S.A. 44-501(h), such as:

- the timing of retirement, i.e., whether injury or retirement occurs first;
- duplication of wage-loss benefits; and
- whether a worker may supplement his or her income with post-retirement wages without being subject to the offset.

This Board Member would find that K.S.A. 44-501(h) literally provides for a social security offset.

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BOARD MEMBER

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Brad E. Avery, Administrative Law Judge

[32] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).